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Paper for the House Committee

**Bills Committee on Trade Descriptions (Unfair Trade Practices)
(Amendment) Bill 2012**

Purpose

This paper reports on the deliberations of the Bills Committee on Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (the Bills Committee).

Background

2. At present, certain undesirable trade practices are prohibited under the Trade Descriptions Ordinance (Cap. 362) (TDO). These include false trade descriptions, false trademarks and mis-statements in respect of goods provided in the course of trade. There are no provisions in the TDO dealing with other types of unfair trade practices such as false trade descriptions of services, misleading omissions, aggressive commercial practices or bait advertising.

3. The emergence of certain unfair trade practices in recent years calls for a review of the existing regulatory regime. To follow up the initiatives announced by the Financial Secretary in February 2007, the Consumer Council conducted a comprehensive review of existing measures to protect consumer rights. Meanwhile, the Government introduced the Trade Descriptions (Amendment) Bill 2007 and made eight pieces of subsidiary legislation under the TDO in 2008 to prohibit misleading price indications and to require suppliers to disclose critical pieces of product information in the sale of certain specified consumer goods. In February 2008, the Consumer Council published the review report entitled "Fairness in the Marketplace for Consumers and Business", which recommended, *inter alia*,

the introduction of a comprehensive Trade Practices Statute in Hong Kong to prohibit unfair trade practices of all types of goods and services.

4. Having considered the recommendations in the review report and examined proposals raised in the community, the latest development in the market and overseas consumer protection regimes, the Government recognized that the safeguards under current legislation were inadequate in tackling certain unfair trade practices. In July 2010, the Government issued a consultation paper, setting out the policy directions for strengthening consumer protection legislation and proposed a package of proposed legislative amendments to the TDO to tackle commonly seen unfair trade practices. In the light of the wide public support for these legislative proposals, the Government subsequently introduced the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (the Bill) into the Legislative Council on 29 February 2012.

The Bill

5. The Bill seeks to amend the TDO to extend its coverage to services, to prohibit certain unfair trade practices and to enhance enforcement effectiveness through the introduction of a civil compliance-based mechanism. The Bill also seeks to facilitate consumer redress. The practices to be prohibited under the Bill are –

- (a) false trade descriptions of services;
- (b) misleading omissions;
- (c) aggressive commercial practices;
- (d) bait advertising;
- (e) bait and switch; and
- (f) wrongly accepting payment.

The Bills Committee

6. At the House Committee meeting held on 2 March 2012, members agreed to form a Bills Committee to study the Bill. Hon Fred LI Wah-ming was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has held eight meetings with the Administration and received views from the stakeholders,

including trade associations and consumer advocates, at one of these meetings. A list of organizations and individuals who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

7. The Bills Committee generally supports the legislative intent of the Bill to enhance protection for consumers against unfair trade practices. In the course of deliberation, members have raised concerns about the proposed offences of false trade descriptions of services and other unfair trade practices, exempt persons and excluded products, enforcement-related matters, consumer redress, commencement, and the omission of a mandatory cooling-off period from the Bill.

False trade descriptions of services (clause 8)

8. False descriptions or misrepresentation undermine consumers' ability to make informed choices and are therefore unacceptable. At present, the TDO prohibits anyone from applying a false or a materially misleading indication of any of the specified aspects to any goods in the course of trade or business. Offenders are liable to a maximum fine of \$500,000 and imprisonment for five years. However, the TDO does not apply to services. To plug this loophole given Hong Kong's status as a service economy, the Bill proposes to extend the application of the TDO to prohibit traders from applying false trade descriptions to services for supply to consumers. The presumption of *mens rea* is displaced by the terms of the proposed offence, as in the present case of false trade descriptions to goods.

9. In view that the current definition of "trade description" in respect of goods is too restrictive, in the sense that pertinent descriptions (such as price indications) presently not listed in the TDO are not subject to its regulation, the Bill proposes to expand the definition of "trade description" in relation to goods to the effect that false indications of any matters with respect to goods will be prohibited. It also proposes to define trade descriptions in relation to services in the same manner.

10. Under the proposed amendments to section 2 in clause 3(9), "trade description", in relation to a service, means an indication, direct or indirect, and by whatever means given, with respect to the service or any part of the service including an indication of any of the following matters —

- (a) nature, scope, quantity (including the number of occasions on which, and the length of time for which, the service is supplied or to be supplied), standard, quality, value or grade;

- (b) fitness for purpose, strength, performance, effectiveness, benefits or risks;
- (c) any other characteristic or attribute of the service not covered by paragraph (a) or (b);
- (d) method and procedure by which, manner in which, and location at which, the service is supplied or to be supplied;
- (e) availability;
- (f) testing by any person and the results of the testing;
- (g) approval by any person or conformity with a type approved by any person;
- (h) a person by whom it has been acquired, or who has agreed to acquire it;
- (i) the person by whom the service is supplied or to be supplied;
- (j) after-sale service assistance concerning the service;
- (k) price, how price is calculated or the existence of any price advantage or discount.

11. The Bills Committee notes that paragraphs (a) to (k) above are examples only and not meant to be exhaustive. Hon Paul TSE has suggested that the Administration should consider amending paragraph (c) to avoid any possible overlapping with the matters covered in paragraphs (d) to (k). The Administration agrees to move Committee Stage amendments (CSAs) to remove paragraph (c) from the proposed definition of "trade description" in relation to a service, and to add a new clause 3(5A) to the Bill to repeal similar reference in the existing definition of "trade description" in relation to goods under section 2 of the TDO. These amendments will make the policy intent clearer and avoid misunderstanding in view of the non-exhaustive nature of the definitions.

12. Clause 8 seeks to introduce a new section 7A in the TDO to make it an offence for a trader to apply a false trade description to a service or to supply, or offer to supply, to a consumer a service to which a false trade description is applied. Under the TDO, false trade description means a trade description which is false to a material degree, or a trade description which,

though not false, is misleading, that is to say, likely to be taken for a trade description of a kind that would be false to a material degree.

13. The proposed section 7A includes a note to the effect that section 21A¹ gives section 7A an extra-territorial application. The Administration has clarified that the proposed section 21A is also intended to apply to other proposed offence provisions (e.g. those under the proposed Part IIB) although a similar note does not appear under those sections. Having considered the legal adviser's suggestion to remove the note under the proposed section 7A, the Administration will propose a CSA to this effect to avoid doubts about the scope of application of the proposed section 21A. The Administration will also propose to add a new subsection to the proposed section 7A to the effect that the section does not apply to false trade descriptions of products covered by the proposed Schedule 4 to the TDO. This will make the policy intent as to the applicability of the section clearer.

14. In this connection, the Bills Committee has raised concern about the use of notes in the Bill (e.g. those under the proposed definitions of "product" and "trader" in the section 2, in the proposed sections 7A, and proposed to be added to sections 15(1) and 19). According to the Administration, these notes serve as signposts to refer readers to the relevant provisions and will not affect the interpretation of the legislation. The legal adviser to the Bills Committee has suggested that the Administration should propose a CSA to clarify the legal status and legislative effect of these notes. The Administration has subsequently advised that to make the policy intent clearer, it will propose a CSA to add a new section 2(6) under clause 3(10) on the effect of notes in the TDO.

Unfair trade practices (clause 13)

15. Clause 13 seeks to add a new Part IIB to the TDO to introduce new offences relating to misleading omissions (new section 13E), aggressive commercial practices (new section 13F), bait advertising (new section 13G), bait and switch (new section 13H) and wrongly accepting payment (new section 13I). The new offences prohibit certain unfair trade practices in relation to both goods and services engaged in by traders. The proposed maximum penalty for these new offences is the same as that for false trade description of goods or services, i.e. a fine of \$500,000 and imprisonment of five years on conviction on indictment, and a fine at level 6 (i.e. \$100,000) and imprisonment of two years on summary conviction. As some of the new prohibitions involve a consideration of whether a commercial practice

¹ Proposed section 21A provides that a trader may commit an offence under the TDO with respect to a commercial practice even if the practice is directed to consumers who are outside Hong Kong if, at the time of engaging in the practice, the trader is in Hong Kong or Hong Kong is the trader's usual place of business.

causes or is likely to cause an average consumer to make a transactional decision that the consumer would not have made otherwise, the proposed section 13D provides that in determining the effect of a commercial practice on the average consumer, account must be taken of the material characteristics of such an average consumer, including that the consumer is reasonably well informed, reasonably observant and circumspect.

16. Under the proposed amendments to section 2 in clause 3(9), "commercial practice" means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

17. Hon James TO has pointed out that traders who claim to engage solely in business to business or wholesale trading may be able to circumvent the law by claiming that their commercial communication is not "directly connected with the promotion of a product to consumers". He has expressed concern whether consumers would be protected from such practices if the promotion of a product under such circumstances falls outside the proposed definition of "commercial practice".

18. The Administration has advised that whether a practice is a commercial practice as defined will depend on the facts and nature of the practice and not solely on the trader's assertions as regards the persons to whom the practice is directed. For instance, it is true that if an advertisement is to promote a product to wholesalers only, the advertisement is not directly connected with the promotion of a product to consumers and hence is not a "commercial practice". However, if somehow a consumer comes across the advertisement and the trader supplies the product to the consumer, the trader engages in an act "which is directly connected with the sale or supply of a product to consumers", in which case the relevant provisions in the Bill will apply.

19. Hon James TO has raised concern whether mere opinions or trade puff (as opposed to factual statements) about goods or services would amount to "trade descriptions", and whether negative advertising (e.g. "Don't buy this product if you want to be miserable for the rest of your life") would constitute "promotion" under the Bill. Moreover, he has suggested that the definition of "commercial practice" be amended by adding "or indirectly" after "directly" to cover indirect communication/promotion (e.g. product placement in movies or TV shows).

20. The Administration has explained that in considering whether an act is a promotion, account has to be taken of all relevant facts and circumstances. An advertisement stating only the possible negative effects of a product does not necessarily mean that it is not a promotion of a product. The example quoted is, in effect, stating the positive effects of the product (i.e. "You will not be miserable if you buy the product"). Even if an advertisement is not directly connected with the promotion of a product, it could be connected with the supply of the product, and hence could still fall within the definition of "commercial practice".

21. The Administration has stressed that the objective of the current legislative exercise is to enable businesses and consumers to trade fairly by eradicating unfair trade practices that the businesses may deploy in promoting, selling and supplying products to consumers in such a way that may affect the decisions of consumers pertaining to specific products. Under the Bill, commercial practices (including commercial communication) have to be directly connected with the promotion or supply of a product. The proposed use of "directly connected" in the definition of "commercial practice" is wide enough to cover the relevant acts. Traders may conduct general promotional campaigns to enhance, for instance, their brand image. These campaigns, if not directly connected with the promotion or supply of a product, should not be caught by the proposed offences.

Average consumer

22. Hon WONG Ting-kwong opines that the definition of an "average consumer" in the proposed section 13D should cover a "user", including a business user, to cope with future developments of business model and changing business environment in Hong Kong. The Administration has advised that expanding the scope of the "average consumer" to cover individuals purchasing goods or services in the course of business will not be in line with the legislative intent of the Bill of enhancing protection for consumers.

23. Under the proposed section 13D(2), in determining the effect on the average consumer of a commercial practice in the circumstances specified in subsection (3), a reference to the average consumer is a reference to the average member of the particular group of consumers. Under subsection (3), the circumstances for the purpose of subsection (2) are: (a) where the commercial practice is directed to a particular group of consumers; and (b) where (i) a clearly identifiable group of consumers is particularly vulnerable to the commercial practice or the underlying product because of mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee; and (ii) the practice is likely to materially distort the economic behaviour only of that group. Under subsection (5),

"materially distort the economic behaviour", in relation to an average consumer, means appreciably to impair the average consumer's ability to make an informed decision and therefore causing the consumer to make a transactional decision that the consumer would not have made otherwise.

24. In response to the legal adviser's suggestion to simplify the formulation of "particularly vulnerable" consumers under the proposed section 13D(3)(b), the Administration will propose CSAs to amend subparagraph (ii) to the effect that "the practice is likely to cause the average member of that group only to make a transactional decision that the member would not have made otherwise", and to remove the proposed section 13D(5) on the definition of "materially distort the economic behaviour". The Administration has also agreed to amend the conjunction between paragraphs (a) and (b) of the proposed section 13D(3) by replacing "and" with "or" to better reflect the legislative intent that the circumstances specified in the two paragraphs are not meant to be cumulative.

25. The Bills Committee has discussed the appropriateness of the Chinese rendition "左右" in the context of the expression "vulnerable" under the proposed section 13D(3)(b)(i), vis-à-vis "影響" in the proposed section 13D(3)(b)(ii). The Administration has advised that the Chinese expression "左右" also means "支配、操縱" or "影響、支配" according to 《現代漢語詞典》 and 《國語活用辭典》. It has wider connotations and is a more suitable rendition for "vulnerable" in the context of the proposed section 13D(3)(b)(i). As the Administration will propose a CSA to the proposed section 13D(3)(b)(ii), the relevant Chinese expression will be amended to the effect that "該營業行為相當可能導致該群體(而非任何其他群體)的一般成員作出某項交易決定，而如該成員沒有接觸該營業行為，該成員是不會作出該項交易決定的" to avoid any textual inconsistencies in the various Chinese texts under the provisions.

Misleading omissions

26. The interests of consumers may be hampered if they cannot get hold of critical pieces of information, either because of outright omissions by businesses or unclear presentation which has the effect of misleading consumers. Businesses should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of their products to consumers. The Bill proposes to amend the TDO to prohibit "misleading omissions" by creating an offence in respect of which the presumption of *mens rea* is displaced.

27. Under the proposed section 13E, a commercial practice is a misleading omission if, in its factual context, it omits or hides material

information, provides material information in a manner that is unclear, unintelligible, ambiguous or untimely, or fails to identify its commercial intent, and as a result causes or is likely to cause the average consumer to make a transactional decision that the consumer would not have made otherwise. "Material information" is defined under the proposed section 13E(5) to include the information that the average consumer needs, according to the context, to make an informed "transactional decision". Under the proposed amendments to section 2, "transactional decision" means any decision made by a consumer, concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or whether, how or on what terms to exercise a contractual right in relation to a product.

28. Hon Vincent FANG has relayed the trades' concern that frontline salespersons who may not fully master all the features and functions of digital and electronic products would risk committing the offence of misleading omissions. He has also raised concern as to whether the failure of a trader to inform consumers of all the promotion offers would constitute a misleading omission.

29. The Administration has advised that under the proposed section 13E(2) and (3), in determining whether a commercial practice is a misleading omission, account has to be taken of all the features and circumstances of the commercial practice, whether there are limitations of the medium used to communicate the commercial practice (including limitations of space or time), and if so, whether any measures have been taken by the trader to make the information available to the consumers by other means. The legislative intent is to guard against the omission of material information in relation to the commercial practice in question. In addition, the existing section 26 of the TDO provides a defence in circumstances where the commission of the offence was due to a mistake or to reliance on information supplied to a trader or to the act or default of another person, an accident or some other cause beyond the trader's control.

30. Having considered the Bills Committee's concern on the use of the Chinese term "隱瞞" (which may connote dishonesty) to refer to "hides" in the proposed section 13E(2)(b) (which, the Administration has clarified, displaces the presumption of *mens rea*), the Administration has subsequently advised that it will propose a CSA to the Chinese text to replace "隱瞞" with "隱藏" to avoid any possible misunderstanding. In the light of the legal adviser's suggestion to revise the expressions on certain material information in relation to a commercial practice that is an invitation to purchase, the Administration has agreed to propose CSAs to amend the proposed section

13E(4)(f)(ii) and (iii) to read "arrangements for delivery of goods" and "arrangements for supply of service", so as to make the policy intent clearer.

Aggressive commercial practices

31. Consumers' freedom of choice is likely to be undermined when they are under undue influence or high-pressure practices and as a result, their consumption behaviour may be affected. The Bill proposes to add new provisions to the TDO to prohibit the use of aggressive practices in consumer transactions by creating an offence in respect of which the presumption of *mens rea* is displaced.

32. Under the proposed section 13F, a commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence, thereby causing the consumer to make a transactional decision that the consumer would not have made otherwise.

33. The Bills Committee notes that the list of factors to be taken into account in determining whether a commercial practice uses harassment, coercion or undue influence under the proposed section 13F(3) is not an exhaustive one. It only lists the factors which the court must take account of. These factors include the timing, location, nature and persistence of the practice, the use of threatening or abusive language or behaviour, the exploitation by the trader of any specific misfortune or circumstance of which the trader is aware and which is of such gravity as to impair the consumer's judgment (e.g. sales pitches in relation to funeral services which take advantage of the consumer's misfortune as a result of the death of his kin), and any onerous or disproportionate non-contractual barrier fettering the consumer's exercise of rights under the contract (e.g. tactics of withholding cancellation forms or designating an inconvenient means of communications which fetter the exercise of the right of cancelling a service contract). The court may consider other factors as it considers fit. The Bills Committee also notes that while the concepts of "coercion" and "undue influence" are defined in subsection (4), "harassment" is not defined in the Bill. The Administration has explained that it is not necessary to define "harassment" as the ordinary dictionary meaning, i.e. being subject to constant interference or intimidation, will suffice for the purpose of the Bill.

34. Hon WONG Ting-kwong opines that the expressions "factual context" and "all of its features and circumstances" are unclear and may lead to abuse by unreasonable consumers against honest traders. The Administration has advised that the requirement of considering the factual

context and all of the features and circumstances of the commercial practice will provide protection to both consumers and honest traders.

Bait advertising and bait and switch

35. Under the proposed section 13G, advertising by a trader of products for supply at a specified price would constitute bait advertising if there are no reasonable grounds for believing that a person acting in the capacity as a trader will be able to offer for supply those products at that price, or the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable, having regard to the nature of the market and the nature of the advertisement. The burden rests with the prosecution to prove the above elements of the offence beyond reasonable doubt.

36. Under the proposed section 13H, a trader engages in a bait and switch if, having made an invitation to purchase a product at a specified price, he refuses to show or demonstrate the product or to take orders for the product or deliver it within a reasonable time, or shows or demonstrates a defective sample of the product, with the intention of promoting a different product. The bait and switch offence is not a strict liability offence, and requires the prosecution to prove that the trader made an invitation to purchase a product at a specified price and then, with the intention of promoting a different product, applied any of the tactics as specified under the proposed section 13H(2).

37. Noting that the "while stocks last" promotion approach is very common, Hon Vincent FANG has called on the Administration to provide sufficient safeguards in the Bill to ensure that businesses acting in good faith would not be inadvertently caught by the offences of bait advertising or bait and switch, for example, by specifying the amount of stock that a business must supply so that honest traders could comply.

38. The Administration has advised that even though the "while stocks last" disclaimer itself may not be sufficient for traders to protect themselves from committing the offence of bait advertising, traders would not be liable to the offence if they are able to supply the products at the specified price for a period that is, and in quantities that are, reasonable having regard to the nature of the market and the advertisement. As regards the bait and switch offence, it would be too inflexible to specify a threshold or percentage of the quantity of a product above which a trader should not switch to promote another product. Under the Bill, the intention of using designated tactics with a view to promoting a different product would have to be proven by the prosecution before the offence could be established. It would provide sufficient protection for businesses acting in good faith from being inadvertently caught. According to the Administration, the legislative intent

of the proposed section 13H is such that the prosecution has to prove an intention of promoting a different product to the consumer at the time of the trader's refusal or demonstration referred to in the proposed section 13H(2)(a) to (c) but not at the time of making the initial invitation to purchase.

39. Hon Vincent FANG has relayed the trades' concern that as the timing of delivery to Hong Kong of certain products, such as popular electronic products manufactured overseas, is outside the traders' control, they may inadvertently commit the offence of bait advertising if they fail to supply such products after launching the advertisement. The Administration has advised that the Bill does not require the immediate delivery of a product. What the Bill requires is that the trader should offer the products for supply for a period that is, and in quantities that are, reasonable, having regard to the nature of the market and the advertisement. The proposed section 26A provides an additional defence to defendants in proceedings for the offence of bait advertising in circumstances where the trader offered to supply, or to procure a third person to supply, the advertised or equivalent products to the consumer within a reasonable time in a reasonable quantity and at the advertised price and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the products.

Wrongly accepting payment

40. Pre-payment for goods or services is becoming an increasingly popular form of consumption. Consumers and businesses stand to benefit from this mode of consumption, as consumers normally enjoy discounts and the cash flow of businesses can be improved. Many problems may arise, however, when traders with no intention or ability to supply the contracted products trick consumers into pre-payment. Due to an information asymmetry, consumers may not be in a position to ascertain the bona fides and capability of businesses in delivering the pledged goods or services. Complaints about traders receiving pre-payments when there is already a risk of closure of the business and consistent over-subscription of services have given rise to widespread public concern. The Bill proposes to create an offence in the TDO to tackle such a practice.

41. Under the proposed section 13I, a trader will commit the proposed offence "wrongly accepting payment" if, at the time of accepting payment for a product, he intends not to supply the product or to supply a materially different product. A trader will also commit an offence if there are no reasonable grounds for believing that he will be able to supply the product within the period specified or within a reasonable period (if no period is specified). Similar to the case of "bait advertising" above, a trader may be held liable even if he holds an unreasonable belief that he could have

supplied the product within the specified period or within a reasonable period.

42. Hon Vincent FANG has raised concern about the criminal threshold of the offence of wrongly accepting payment. The Administration has advised that the proposed section 26B provides an additional defence for defendants in proceedings for the proposed offence. If the defendant can adduce sufficient evidence to raise an issue that he offered to supply, or to procure a third person to supply, the products or equivalent products and, if that offer was accepted by the consumer, he supplied or procured a third party to supply the products, he will be entitled to be acquitted unless the contrary is proved by the prosecution beyond reasonable doubt.

Exempt persons and excluded products (clause 23)

43. In view of the presence of sector-specific regimes, the Bill proposes that certain sectors should not be brought under the ambit of the expanded TDO. Clause 23 seeks to insert new Schedules 3 and 4 to the TDO. The new Schedule 3 sets out categories of professionals who are exempted from the new prohibitions to be imposed on traders if they supply (or offer to supply) a service or engage in a commercial practice while acting in their professional capacity. These exempt persons include professionals whose conduct is regulated under various Ordinances, e.g. accountants, barristers, solicitors, medical practitioners, architects, engineers, surveyors and estate agents. The new Schedule 4 sets out classes of goods or services that are excluded from the definition of "product". Under the new Schedule 4, a trader will not be bound by new section 7A and Part IIB in relation to financial products (goods or services) the sale or supply of which by the trader is regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) or the Securities and Futures Ordinance (Cap. 571).

44. Hon James TO has expressed concern whether an exempt person listed in the proposed Schedule 3 will be exempt from an offence in respect of trade descriptions of goods under the existing section 7 of the TDO, if that person supplies or offers to supply any goods to which a false trade description is applied. Furthermore, he has suggested that the formulation of the proposed Schedule 3 be amended by making reference to the proposed Schedule 4, in order to achieve a more clearly defined coverage of "exempt person" instead of just setting out categories of professionals who are exempted in the course of their practices from the new prohibitions being imposed on traders.

45. The Administration has advised that under the proposed amendments to section 2, "exempt person" refers to a person who is acting in the capacity

of a person described in an item of the proposed Schedule 3. While the existing section 7 applies to any person "in the course of any trade or business" (including an exempt person acting in his registered professional capacity), the other proposed sections of the TDO (i.e. sections 7A and 13E to 13I) apply to any commercial practice in which the exempt person is engaged (as a trader) that is not in the person's registered professional capacity. The Administration considers that the proposed Schedule 3 (read in conjunction with the proposed definition of "exempt person" under section 2) already reflects its objective.

46. Noting that the financial products described in the proposed Schedule 4 will not be brought under the ambit of the Bill, Dr Hon LEUNG Ka-lau has sought information on the protection under the current financial regulatory regimes against practices akin to those to be prohibited under the Bill. According to the Administration, there are well-established and tailor-made regulatory regimes governing product authorization, intermediary regulation and the selling process under various Ordinances. They are enforced by relevant financial market regulators including the Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority, the Insurance Authority and other market operators and professional bodies. The financial regulatory regimes are on par with international practices. Under these regimes, the regulatory requirements are formulated in the light of the nature of the financial products with a view to ensuring a fair, orderly and open market to protect investors. In general, these regulatory requirements seek to protect investors from misleading or deceptive practices, and require the disclosure of relevant information for investors to make an informed decision. They seek to address problems similar to those that the Bill seeks to tackle.

Enforcement-related matters (clauses 24 to 27)

47. To capitalize on the respective enforcement experience and expertise of the Customs and Excise Department (C&ED), the Bill proposes that C&ED be tasked to enforce the proposed offences, with concurrent enforcement powers to be conferred on the Telecommunications Authority (TA) and the Broadcasting Authority (BA) in respect of the telecommunications and broadcasting services respectively.

48. Clause 24 seeks to insert in section 2(1) of the TDO definitions of the BA and the TA. Clause 25 seeks to amend section 15(1) to include a new power for authorized officers to require persons carrying on, or employed in connection with, a trade or business to produce certain books or documents (i.e. those required to be kept under the TDO and its subsidiary legislation) for the purpose of ascertaining whether an offence under the TDO has been or is being committed. Clause 26 proposes to insert a new section 16BA

empowering the Commissioner of Customs and Excise (the Commissioner) to issue guidelines on matters related to the enforcement of the TDO by authorized officers. Guidelines are not subsidiary legislation and a person does not incur any civil or criminal liability through merely contravening them. Clause 27 seeks to insert new sections 16E to 16I in the TDO to confer on the TA and the BA jurisdiction to enforce the TDO (except Part IIIA which deals with proceedings relating to the importation of infringing goods) for their respective sectors.

49. The Administration has informed the Bills Committee that to take account of the establishment of the Communications Authority (CA) under the Communications Authority Ordinance (Cap. 616) to take over the functions previously exercised by the TA and the BA, the Administration will move CSAs to repeal the definitions of the BA and the TA, and add a new definition of the CA to section 2(1). Consequential amendments will also be made to the proposed sections 16E, 16F, 16G and 16H.

Compliance-based mechanism (clause 29)

50. While the specified unfair trade practices (including false trade descriptions of goods at present and the other proposed offences) should attract criminal sanctions, the Bill proposes to establish a compliance-based enforcement mechanism with the main objectives of encouraging compliance and facilitating quicker settlement.

51. Clause 29 seeks to insert a new Part IIIB to the TDO to establish a compliance-based enforcement mechanism. Under the proposed mechanism, the enforcement agency is empowered to accept undertakings from traders suspected of deploying any unfair trade practices to stop and not to repeat an offending act (new section 30L), and where necessary, to seek injunctions from the court for the purpose (new section 30P). This mechanism is expected to be able to deliver quicker and better outcomes for consumers, and will be adopted as far as possible depending on the nature and circumstances of the case.

52. The Chairman of the Bills Committee has expressed concern that officers of the enforcement agency may be given too much discretion under the compliance-based mechanism. The Administration has advised that under the proposed section 16BA(1), the Commissioner is empowered to issue guidelines on matters in relation to which authorized officers may exercise powers under the TDO. The proposed section 16BA(6) further provides that the Commissioner must consult any persons that he considers appropriate before issuing any guidelines or amendments of the guidelines. Furthermore, the enforcement agency's decision to prosecute or to resort to

the compliance-based mechanism will be subject to the consent of the Secretary for Justice.

53. The Administration has subsequently provided for members' information a draft framework of the guidelines proposed to be issued under the new section 16BA. The draft contains a statement of enforcement policy, and chapters on the scope of application of the fair trade provisions, the interpretation of important terms, the operation of an offence provision and the sanctions available. The draft reflects the Administration's preliminary views at this stage on the operation of the relevant provisions of the TDO and is subject to further deliberation within the Administration and, if necessary, to refinements, before it is formally put to stakeholders for consultation.

54. Some members of the Bills Committee including Hon Vincent FANG and Hon WONG Ting-kwong opine that the enforcement guidelines to be issued under the new section 16BA (and section 16H in relation to telecommunications and broadcasting services) should provide useful reference, with more concrete examples, for the trades and the frontline staff. They urge the Administration to consult the trades on the formulation of the guidelines. Hon Vincent FANG also urges the Administration to stipulate clearly in the guidelines what would constitute an offence under the TDO. This will enhance traders' understanding on how the law will be enforced to avoid inadvertent contravention. At the request of the Bills Committee, the Administration will consult the Panel on Economic Development (EDEV Panel) on the draft enforcement guidelines during the consultation.

55. The Bills Committee has discussed the need to replace "CFI" with its long form "Court of First Instance" in the heading of the proposed section 30S which would enable the Court of First Instance to exercise the District Court's powers under the new provisions in certain specified circumstances. The Administration has subsequently agreed to propose a CSA to amend the heading for clarity purpose.

Consumer redress (clauses 30 and 31)

56. To facilitate aggrieved consumers to seek restorative justice, clause 30 proposes to insert a new section 18A empowering the court to order a person convicted of an offence relating to unfair trade practices under the TDO to compensate any person who suffers financial loss resulting from the offence. Clause 31 seeks to insert a new section 36 enabling persons aggrieved by unfair trade practices to commence civil actions against other persons (not being exempt persons) to recover the amount of any loss or damage suffered.

57. The legal adviser has suggested that consideration be given to including a provision similar to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458) to pre-empt any attempt by traders to evade the operation of the TDO, including the proposed rights of private action under the proposed section 36, or to oust the jurisdiction of the Hong Kong courts by artificially inserting a choice of law clause in the contract to apply the law of a jurisdiction other than Hong Kong.

58. The Administration has advised that the criminal sections of the TDO essentially govern conduct in Hong Kong irrespective of any choice of governing law for a related contract. As regards civil liability, the Administration will propose a CSA to add a new subsection under the proposed section 36 to provide that any term in a contract which purports to exclude or restrict the right of a claimant to bring an action under the proposed section 36(1) against any person will be of no effect.

Commencement

59. To cater for any possible change in the post title of "Secretary for Commerce and Economic Development" after the enactment of the Bill and before its commencement, the Administration has informed the Bills Committee that it will propose CSAs to replace the title with "Secretary", and to add a new clause to provide that "Secretary" has the meaning given by section 2(1) of the TDO.

60. Members of the Bills Committee consider that to protect consumers from unscrupulous traders, the Consumer Council should enhance public education to let consumers beware of unfair trade practices. The Administration should step up promotion by, for example, distributing leaflets and organizing seminars to enhance traders' and consumers' understanding of the enforcement guidelines, and setting up a hotline to answer enquiries on the amended TDO. The Administration should also exercise caution in undertaking enforcement actions.

61. The Administration has advised that it will launch a widespread education campaign for both traders and consumers after the passage of the Bill. The enforcement agencies will exercise due diligence and examine all the circumstances of each complaint, including meeting with the complainant to ascertain the facts of the case, before taking any enforcement decisions. According to the proposed sections 16BA(7) and 16H(4), the guidelines will be made available to the public for inspection. The enforcement agencies will also upload the guidelines onto their websites.

62. As regards the timing of commencement of the amendments to the TDO in 2013, the Administration has advised that it will take time to work

out implementation details as the enforcement agencies will have to equip their staff to cope with the new modus operandi. At the Chairman's request, the Administration has undertaken to inform Members of the proposed commencement date of the amendments to the TDO in the speech to be delivered by the Secretary for Commerce and Economic Development (SCED) during the resumption of the Second Reading debate on the Bill.

Mandatory cooling-off period

63. The Bills Committee notes that the public consultation report published in January 2011 proposed the mandatory imposition of a cooling-off period. In the consultation report, the Administration proposed that the scope of the cooling-off period arrangements should cover two types of consumer contracts, namely those involving goods or services (or both) with a contract duration of not less than six months and those concluded during unsolicited visits to consumers' homes or places of work. During the consultation, divergent views were received. Some welcomed the proposals contained in the consultation document. However, trade associations expressed concerns about the practical arrangements including the arrangements for consumers to exercise the right of cancellation, the refund arrangements and small-value transactions. In view of the above, the Administration considered that more time was required to study how to address these concerns properly by legislation. To ensure that the mandatory cooling-off period arrangements would not affect the timely introduction of other legislative amendments to enhance consumer protection, the Administration further briefed the EDEV Panel on 14 October 2011 on its proposal to first take forward those amendments aimed at criminalizing commonly seen unfair trade practices on which there was already a consensus.

64. Some members of the Bills Committee including Hon WONG Kwok-hing and Hon Starry LEE have expressed disappointment with the Administration's decision to shelve the earlier planned proposal on the mandatory cooling-off period. Hon Starry LEE urges the Administration, with the assistance of the Consumer Council, to engage the trades in formulating voluntary codes of practice in the meantime. Hon Vincent FANG, however, opines that a balance of the interests of all stakeholders should be struck in formulating the legislation. Whilst the cooling-off period arrangements would protect the consumers, they should also be made aware of the need to take responsibility for their own purchase decisions, so that they would not make impulsive purchase decisions in the knowledge that they could always obtain a refund with the protection of the cooling-off period.

65. The Administration has assured members that it will continue to study how to address the concerns about the cooling-off period arrangements after the passage of the Bill. At the Bills Committee's request, the Administration has subsequently advised that SCED will reiterate in his speech during the resumption of the Second Reading debate on the Bill the Administration's commitment and work plan to further examine the proposal on the mandatory cooling-off period to ensure satisfactory implementation of the proposed measure.

Committee Stage amendments

66. Apart from those set out in the above paragraphs, the Administration has also proposed some other CSAs, including those to take on board certain suggestions of the legal adviser to improve clarity and consistency. A set of CSAs to be moved by the Administration is in **Appendix III**. The Bills Committee has not proposed any CSAs.

Recommendation

67. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 27 June 2012.

Follow-up actions to be taken by the Administration

68. During the deliberations of the Bills Committee, the Administration has undertaken to take the following actions –

- (a) the Administration will consult the EDEV Panel on the draft enforcement guidelines during the consultation (paragraph 54 above);
- (b) SCED will inform Members of the proposed commencement date of the amendments to the TDO in his speech during the resumption of the Second Reading debate on the Bill (paragraph 62 above); and
- (c) SCED will reiterate in his speech during the resumption of the Second Reading debate on the Bill the Administration's commitment and work plan to further examine the proposal on the mandatory cooling-off period (paragraph 65 above).

Advice sought

69. Members are requested to note the deliberations and recommendation of the Bills Committee.

Council Business Division 1
Legislative Council Secretariat
15 June 2012

**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

Membership List

Chairman	Hon Fred LI Wah-ming, SBS, JP
Members	Hon James TO Kun-sun
	Hon Vincent FANG Kang, SBS, JP
	Hon WONG Kwok-hing, MH
	Hon WONG Ting-kwong, BBS, JP
	Hon Starry LEE Wai-king, JP
	Dr Hon LEUNG Ka-lau
	Hon Paul TSE Wai-chun, JP
	Hon Tanya CHAN

(Total : 9 members)

Clerk	Ms YUE Tin-po
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Legal Adviser	Mr Bonny LOO
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**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

List of organizations/individuals that have given views to the Bills Committee

1. Hong Kong General Chamber of Commerce
2. Hong Kong Small and Medium Enterprises Association
3. Democratic Party
4. Mr Andrew CHIU Ka-yin, Eastern District Councillor and Accredited Mediator
5. Federation of Beauty Industry (HK) Ltd
6. The Cosmetic & Perfumery Association of Hong Kong
7. Supervisory Group
8. Public Service Monitoring Group
9. Hong Kong Retail Management Association
10. The Hong Kong Chinese Importers' & Exporters' Association
11. Kowloon West New Dynamic
12. Consumer Council
13. Civic Party
14. Communications Association of Hong Kong
15. Democratic Alliance for the Betterment and Progress of Hong Kong
16. Mr YEUNG Wai-sing, Eastern District Councillor*
17. Mr CHIN Wai-lok*
18. PCCW*
19. Mr CHENG Tsuk-man, Shatin District Councillor*
20. Architects Registration Board*
21. The Professional Commons*
22. The Law Society of Hong Kong*
23. 全港豬肉零售業聯席會議*

* submitted written views only

Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

Committee Stage

Amendments to be moved by the Secretary for Commerce and Economic
Development

<u>Clause</u>	<u>Amendment Proposed</u>
1	By deleting subclause (2) and substituting— “(2) This Ordinance comes into operation on a day to be appointed by the Secretary by notice published in the Gazette. (3) In subsection (2)— <i>Secretary</i> (局長) has the meaning given by section 2(1) of the Trade Descriptions Ordinance (Cap. 362).”.
3	By adding— “(5A) Section 2(1), definition of <i>trade description</i> — Repeal paragraph (e). ”.
3(6)	By deleting “after paragraph (e)” and substituting “before paragraph (f)”.
3(9)	In the proposed definition of <i>consumer</i> , by deleting “outside” and substituting “unrelated to”.
3(9)	In the proposed definition of <i>trade description</i> , by deleting paragraph (c).
3(9)	By deleting the proposed definition of <i>Secretary</i> .
3(10)	By adding— “(6) A note located in the text of this Ordinance is provided

for information only and has no legislative effect.”.

8 By renumbering the proposed section 7A as section 7A(1).

8 In the proposed section 7A(1), by deleting the note.

8 In the proposed section 7A, by adding—

“(2) In this section—

service (服務) does not include any service covered by
Schedule 4.”.

9 By deleting subclause (2) and substituting—

“(2) Section 8—

Repeal subsection (2)

Substitute

“(2) The trade description is to be taken as referring to all goods or services of the class, whether or not in existence at the time the advertisement is published—

(a) for the purpose of determining whether an offence has been committed under section 7(1)(a)(i) or 7A(1)(a); and

(b) where goods or services of the class are supplied or offered to be supplied by a person publishing or displaying the advertisement, also for the purpose of determining whether an offence has been committed under section 7(1)(a)(ii) or 7A(1)(b).”.

9 By deleting subclauses (3), (4) and (5).

- 13 In the proposed section 13D(3)(a), by deleting “and” and substituting “or”.
- 13 In the proposed section 13D(3)(b)(ii), by deleting “materially distort the economic behaviour only of that group” and substituting “cause the average member of that group only to make a transactional decision that the member would not have made otherwise”.
- 13 By deleting the proposed section 13D(5).
- 13 In the proposed section 13E(2)(b), in the Chinese text, by deleting “瞞” and substituting “藏”.
- 13 In the proposed section 13E(4)(f)(ii), in the English text, by adding “of goods” after “delivery”.
- 13 In the proposed section 13E(4)(f)(iii), by deleting “performance” and substituting “supply of service”.
- 15 In the proposed section 20(2)(a), by adding “company” before “secretary”.
- 15 In the proposed section 20(3), in the definition of *principal officer*, by adding “or engaged” after “employed” (wherever appearing).
- 15 In the proposed section 20(3), by adding—
“*company secretary* (公司秘書) includes any person occupying the position of company secretary, by whatever name called;”.
- 18(1) By deleting “7A(b)” and substituting “7A(1)(b)”.

- 23 In the proposed Schedule 4, by deleting “[ss. 2 & 37]” and substituting “[ss. 2, 7A & 37]”.
- 23 In the proposed Schedule 4, in the Chinese text, by deleting “及《證” and substituting “或《證”.
- 24 By deleting the proposed definitions of *Broadcasting Authority* and *Telecommunications Authority*.
- 24 By adding—
“*Communications Authority* (通訊事務管理局) means the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap. 616);”.
- 27 In the proposed section 16E(1), by deleting “Telecommunications Authority and the Broadcasting Authority may each” and substituting “Communications Authority may”.
- 27 In the proposed section 16E(2), by deleting everything after “specify” and substituting “powers covered by subsection (1) that are not exercisable by the Communications Authority.”.
- 27 In the proposed section 16E(3), by deleting “Telecommunications Authority” and substituting “Communications Authority”.
- 27 In the proposed section 16E(3), by deleting everything after “practices of” and substituting—
“licensees under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562) that are directly connected with the provision of a

telecommunications service or broadcasting service under the relevant Ordinance.”.

- 27 By deleting the proposed section 16E(4), (5) and (6).
- 27 In the proposed section 16E(8), by deleting everything after “commercial practice by the” and before “does not” and substituting “Communications Authority or any public officer authorized in writing by that Authority”.
- 27 In the proposed section 16E(9), by deleting everything after “this Ordinance the” and before “does not” and substituting “Communications Authority or any public officer authorized in writing by that Authority”.
- 27 In the proposed section 16F(1), by deleting everything after “Commissioner” and before “bodies” and substituting—
“or the Communications Authority is performing a function under this Ordinance in relation to a matter over which the other has concurrent jurisdiction, the 2”.
- 27 In the proposed section 16F(2), by deleting everything after “Commissioner” and before “has concurrent” and substituting—
“or the Communications Authority is performing or has performed a function under this Ordinance in relation to a matter over which the other”.
- 27 In the proposed section 16G(1), by deleting “Telecommunications Authority, and the Commissioner and the Broadcasting Authority,” and substituting “Communications Authority”.

27 In the proposed section 16G(5), by deleting “Each set of parties referred to in subsection (1)” and substituting “The Commissioner and the Communications Authority”.

27 In the proposed section 16H(1), by deleting “Telecommunications” (wherever appearing) and substituting “Communications”.

27 By deleting the proposed section 16H(2).

27 In the proposed section 16H(3), by deleting everything after “For this” and substituting—

“purpose—

(a) the reference in subsection (2)(a) of that section to authorized officers is to be taken to be a reference to the Communications Authority or any public officer authorized in writing by that Authority to exercise any of the powers that by virtue of section 16E are exercisable by that Authority; and

(b) any reference in subsection (3), (5) or (6) of that section to the Commissioner is to be taken to be a reference to the Communications Authority, or the Communications Authority jointly with the Commissioner, as the case requires.”.

27 By deleting the proposed section 16H(4) and substituting—

“(4) The Communications Authority or, in the case of jointly issued guidelines, both the Communications Authority and the Commissioner must make copies of all guidelines and amendments of guidelines available to the public for inspection at their office during ordinary business hours.”.

- 29 By deleting the proposed section 30L(3) and substituting—
- “(3) Subject to subsection (3A), a person who has given an undertaking may, with the consent of an authorized officer, withdraw or vary it, or give a new undertaking in substitution for it, at any time.
- (3A) An authorized officer may only consent under subsection (3) to the withdrawal of, or a variation of or substitution for, an undertaking if the officer has obtained the consent in writing of the Secretary for Justice to doing so.”.
- 29 In the proposed section 30N(2), in the Chinese text, by deleting everything after “獲授權人員” and before “，方” and substituting “須獲律政司司長書面同意該人員根據本條發出通知”.
- 29 In the proposed section 30N(3)(b), by adding “or continue” after “bring”.
- 29 In the proposed section 30S, in the English text, in the heading, by deleting “**CFI**” and substituting “**Court of First Instance**”.
- 31 In the proposed section 36, in the Chinese text, by deleting “提出” (wherever appearing) and substituting “提起”.
- 31 In the proposed section 36, by adding—
- “(3) A term of a contract that purports to exclude or restrict the right of a claimant to bring an action under subsection (1) against any person is of no effect.”.

34

In the English text, by deleting “等” (wherever appearing).